

**CAIRN TERRIER CLUB OF DENVER**

**ESTATE PLANNING FOR YOU  
AND YOUR DOG**

**PRESENTED BY**

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**TUESDAY, MARCH 4, 2008**

**TOPICS INCLUDE  
ANIMAL LAW V. ANIMAL RIGHTS  
WHY DOGS ARE TREATED AS PROPERTY  
MAKING DOG PROVISIONS IN YOUR WILL  
AND MORE**

**A CAIRN CLUB OF DENVER  
EDUCATIONAL PROGRAM**

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## THE ORIGINS OF ANIMAL WELFARE IN THE UNITED STATES

The first Humane Society of America was founded in 1866. Its founder, Henry Bergh, was the son of a prominent shipbuilder. In 1866 he gave a speech to an audience of some of Manhattan's most politically powerful, pleading on behalf of "these mute servants of mankind". The American Society for the Prevention of Cruelty to Animals was formed April 10, 1866, and just nine days later the New York State Legislature passed an anti-cruelty law, giving the ASPCA the right to enforce it. The mission of the ASPCA was "to provide effective means for the prevention of cruelty to animals throughout the United States."

Since that time, laws to protect the welfare of animals have been enacted at the Federal, State and local level. The current federal laws to protect the welfare of animals are:

- The Animal Welfare Act (AWA)

- The Humane Slaughter Act

- The Marine Mammal Protection Act

- The Endangered Species Act

Only the Animal Welfare Act affects pets. This act, passed in 1966, specifically is intended to protect pet owners from theft of pets and to prevent the sale of pets to research facilities. The AWA requires that minimum standards of care and treatment be provided for certain animals bred for sale, used in research, transported commercially or exhibited to the public.

The USDA is in charge of inspecting all laboratory facilities, circuses and other exotic animal exhibitions; they have only approximately 100 inspectors nationwide. These mandated inspections exclude pet shops, rodeos, livestock and dog shows, and the administrative process is slow and ineffective.

There are many more laws directly related to animals, especially pets, at the state and local level, with the local laws the most expansive (and intrusive). All 50 states have an animal cruelty statute and have laws regulating hunting, trapping and fishing of animals. Most states have laws that regulate exhibited animals, pet shops and farm animals. Almost all counties and municipalities have laws regulating the number, licensing and control of pets, specifically dogs.

## ANIMAL LAW V. ANIMAL RIGHTS

Animal law has come a long way since the term was first used in the late 1980's, with courses now being taught in law schools and legal issues being argued by many organizations and activists.

**ANIMAL LAW:** This is statutory and decisional law in which the legal, social or biological nature of animals is an important factor. Primarily the laws attempt to carve out protections that free animals from unnecessary abuse and mistreatment.

**ANIMAL RIGHTS LAW:** Focuses on whether humans have a right to view and use animals and what rights animals have as living "sentient" beings. Often a moral or ethical agenda.

### SPECIFIC EXAMPLES OF WHERE ANIMAL LAW IS APPEARING;

1. Wrongful death of a companion animal
2. Veterinary medical malpractice
3. Constitutional rights protections
4. Defense of vicious dog hearings
5. Creating pet trusts
6. Enforcing existing animal protections
7. Cases relating to fraud, misrepresentation and false advertising
8. Failure to comply with contractual agreements

HB-1308: The following Colorado Legislative Report, prepared for the Colorado Federation of Dog Clubs by Janet Fox Stephens, describes HB-1308, currently before the State House of Representatives.

This bill permits the owner of a companion or assistance animal to recover damages (up to \$25,000 for loss of companionship, under certain circumstances, if the animal is tortured or needlessly tormented or killed. Owners may also recover damages, under certain circumstances, if a veterinarian's negligence caused injury or death to the animal. The bill requires a veterinarian to get informed consent from an animal's owner prior to performing a service that involves serious risk to the animal.

Under the bill, a veterinarian who complies with the informed consent requirement is not liable for damages. It also provides immunity from liability for negligence resulting in injury or death of a companion or assistance animal for veterinarians who do not inoculate the animal if they certify that inoculation is contraindicated. The bill requires licensing authorities to accept such certification from a veterinarian in lieu of evidence of vaccination for the purpose of issuing a license for an animal.

The bill adds knowingly, recklessly or with criminal negligence causing serious physical harm to an assistance dog or service animal to the existing class 6 felony of aggravated cruelty to animals.

The bill carries a state fiscal note of \$281,000. (Note: There is no allowance in the budget which makes it less likely to pass. If they take the felony out, which removes the fiscal

note, then this could pass). The bill creates a new cause of action and will increase lawsuits and civil cases filed in court. The bill increases the damages that may be awarded to an owner if the animal is harmed or killed.

The bill defines “assistance animal” and “companion animal.” It also states that companion animals and assistance animals are often treated as member of the family and that they are not mere property but comprise “living property” (guardian??) and as such should be granted special recognition under Colorado Law.

Colorado Federation of Dog Clubs actively opposes this bill.

## OWNERS V. GUARDIANS

This is a hotly contested designation. All of us who 'own' animals also consider them to a part of our family. However, when it comes to legal definitions, this can have an enormous impact on how we are able to care for, treat, show, sell and provide for our pets.

"Owner" implies an animal is personal property.

"Guardian" designates animals as separate and unique entities deserving of protection and respect. Sounds good, doesn't it?

We need to be aware that the use of 'owner or 'guardian' is not 'just a term.' Words have power. We all recognize that the cultural and social relationship that humans have with their pets transcend that of property. Emotionally, the term "guardian" feels better than the term "owner". No one knows that better than PETA and other radical animal rights organizations that words have power. Therefore, it should be noted that PETA and many similar organizations which purport to want animal "rights" are very much in favor of changing the status of pets from owner to guardian. Each of these organizations claims to "speak" for animals. They are in the business of substituting their judgment for that of the owner. Where there are conflicting "rights" there is a quagmire of legal battles waiting to be fought, new precedents and huge expenses in defending decisions made on behalf of our pets. Such a designation could make us more liable personally for the actions of our "charges" than under current law. Currently, if your dog kills my dog, the usual amount that can be recovered is the cost or value of the animal, plus any expenses and including any foreseeable loss of income. However, non-economic damages are rarely if ever awarded. Damages, such as for loss of companionship, needless torture, harassment, pain and suffering (of both the animal as well as the humans) would have to be litigated. If these become a part of the loss, the legal expense to defend a claim goes up markedly. As much as it hurts to lose a dog, once they are placed on a higher level, there will be more suits filed, the majority of which will be for pain and suffering and punitive damages, i.e., as a deterrent. Up until now, it has not been worth most attorneys' time due to the cost to bring a lawsuit through to the end because of the limited amount of damages in comparison with the expense of litigating. This would all change.

### OWNER/POSSESSION V. GUARDIANSHIP/CUSTODY

As a rule, family courts do not want to have pets awarded to a party as a guardian....because then you can have 'visitation', custody orders, support, and a whole host of disputes that all end up back in the court. Possessions can not be divided, i.e. only one person gets the piano or the house....and once decided it can be revisited by the court. The courts have enough problems with post-divorce custody disputes; they do not want to open a whole new can of worms with pets. And neither should we.

As owners, breeders, sellers, show and the like, these are all decisions we can make without legal oversight. Owners have absolute right of control of their property. Guardians do not. And once the animal itself 'has rights' then someone has to interpret what the rights are and who can enforce them.

## PET CUSTODY IN COLORADO

### POTENTIAL PET CUSTODY SITUATIONS

Divorcing Couples

Co-habiting Couples

Office Mates

Parents and Children

Adoption

Lost and Found/Abandonment

### LEGAL OPTIONS IN A DIVORCE

THE TYPES OF ISSUES THAT PET OWNERS SHOULD CONSIDER DURING A DIVORCE AND WHY PET OWNERS COULD BENEFIT FROM REACHING AN AGREEMENT OUTSIDE OF COURT.

THE LAW: Remember, personal property cannot be jointly owned, therefore, the law will recognize one party as the pets' owner after the divorce. Custody and visitation are terms that generally recognized as applying to children.

During the divorce the parties must come to a final agreement as to the division of marital personal property, if not, the judge decides for them. However, with a unique or highly sentimental marital item, the court must decide. In doing so, the court might consider the following factors:

1. Who bought the pet and paid for subsequent expenses such as veterinarian, registration, grooming, boarding, food and supplies;
2. Who is best able to afford future pet-related expenses;
3. Who cared for the pet (e.g. took it to the vet, trained it, spent the most time with it, cleaned up after it);
4. Who the children, if there are any, will live with (the pets commonly stay with the children);
5. Who has the most suitable home for the pet (e.g. fenced yard);
6. The health and age of both the parties and the pet.

It is always best and least expensive to try and reach an agreement out of court. Such agreements, between the parties, attorneys or by mediation can address specifics that a judge may not otherwise allow, such as: Decision-making, medical, discipline and training, feeding, transportation, breeding, boarding, end-of-life, insurance, expenses, exchange of information, record-keeping and estate planning.

The new trend in pet custody battles has been to treat animals more like children, with courts beginning to reject a strict property analysis and consider the best interests of the animal in deciding which party will be awarded custody. Most family courts do not want to go down this route, as it generates more litigation, monitoring and enforcement.

## **DOMESTIC VIOLENCE, PROTECTION ORDERS AND PET CUSTODY**

As of July 1, 2007, a new Colorado Statute (CRS§13-14-102(1)(a)) became effective, which recognizes that domestic violence includes property control. Under this new statute, it could be argued that the provisions of CRS§13-14-102(15)(g)(1) apply to protect pets. The Court, under this new section of the Civil Protection Order statute could issue a temporary injunction that prevents an alleged perpetrator from “transferring, encumbering, concealing, or in any way disposing of personal effects.” The duration of this temporary injunction shall not exceed 120 days.

In addition, CRS§18-6-800.3 was modified effective July 1, 2007 to include “including an animal” to the following definition of domestic violence:

“...Any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation or revenge...”

### **CONTRACTS ARE THE WAY OF PREVENTING CONFLICTS**

Contracts or agreements are one way of preventing future conflicts. Should there be litigation, traditional principles of interpretation, construction and enforcement apply. While courts have enforced inferred contracts based upon conduct, intent and declarations where they were not reduced to writing, it is much wiser to put all agreements in writing.

Under the Colorado Marital Agreement Act, CRS§14-2-301 et seq., agreements made in contemplation of marriage or between current spouses, the parties may contract with regards to acquisition, disposition, management and control of any property and with regards to any other matter that is not in violation of public policy. Mere cohabitation does not trigger any marital rights, therefore cohabitating couples can enter into contracts so long as their relationship is incidental to the agreement, and these contracts are enforceable in law or equity.



## PROVIDING FOR YOUR ANIMALS WHEN YOU CAN'T

One of the most frequently overlooked aspects of estate planning is providing for our pets. Regardless of how formal or informal the arrangements, please arrange for someone to step in on a moment's notice. Illness, death, accidents, family emergencies do happen. Keep clear and concise records. Your plans can span the spectrum from family members or friends stepping in, to powers of attorney or a Trust for Pets, or a combination.

1. **DURABLE POWER OF ATTORNEY:** The purpose of a durable power of attorney is to designate an individual to step into your shoes when you are incapacitated and unable to make such decisions. It is best to be specific about what powers you are transferring to this person. Designating an individual to step in on short notice is invaluable. Note: a durable power of attorney can be for specific limited powers or can be general. You may want to have a different individual to have a durable power of attorney to make medical or general financial decisions.
  - a. Choose someone in reasonable close proximity. Discuss this with the individual and give them a copy of the Durable Power of Attorney. You may also want them to have keys to your residence and leave instructions as to what vet you use and other resources for them to use.
  - b. If at any time your designated person moves, has a change in circumstances or may be out of the country, you should provide for a backup.
  - c. Be aware that they can do anything you could do, such as selling the pet, placing it in a rescue shelter, get veterinary care, spay or neuter, etc. So be very specific with this individual about your wishes and perhaps attach a list of instructions to the POA.
2. **CO-OWNERSHIP:** Depending on the co-ownership contract ( and you do have a contract, right?) the surviving co-owner will make all decisions about the dogs/animal) However, if at all possible, it is wise to note in your will that there are dogs of yours that are co-owned, where the dogs reside and your wishes concerning these dogs. If they are to automatically be the sole property of the co-owner, state it so that an executor of your estate doesn't consider them as property, one-half of which is attributable to the estate. You can also state this intention in the co-ownership agreement. Be aware that your family members not familiar with dog contracts will naturally assume that they are part of the estate and want to sell them.
3. **MEMORANDUM FOR DISPOSITION OF TANGIBLE PROPERTY:** A common article in a will is the Memorandum for Disposition of Tangible Personal Property, which is usually used to bequeath personal property to individuals. You may want to make a separate reference in your will to a Memorandum for Animals. Wills are not something that you want to have to redo unnecessarily. Your will should state that you will leave a hand-written Memorandum of Personal Property and/or Memorandum for Animals with the will. This is something that can be torn up, replaced and changed as needed. You will want to be very specific about the animals and what you want done. NOTE: This memorandum needs to be in your handwriting, signed and dated. It does not require a notary or witnesses.

PROBLEMS: It may not be accepted in all jurisdictions. It may not be found or it may too vague to follow. You will probably need to provide some monies for the care and transfer of the animals. You may not remember to do it, leaving nothing to guide the executor.

4. **SPECIFIC BEQUEST OF THE ANIMAL TO A PERSON AS ITS**

**CAREGIVER:** You can designate a family member, friend or a particular rescue or shelter to make the decisions of placing your animals in proper homes. It becomes difficult to know how much of a specific devise should be allotted for the future expenses of caring for the animals. You can also combine this with the Memorandum for Animals. If you provide a cash bequest to the Guardian/Caregiver, it would need to be contingent on the animal(s) surviving you and that the person agreeing to take custody of such animals. This does not give any method of monitoring the care of the animal(s).

5. **BREED SPECIFIC RESCUE** One of the often overlooked but very important resources for stepping in and taking care of our purebred dogs is the Breed Specific Rescue. These are the people who ‘do the job’ every day of evaluating the dog and finding the right home for it.

6. **THE “PET GUARDIANSHIP PROGRAM” THROUGH THE DENVER DUMB FRIENDS LEAGUE.**

For those that do not have a friend or family member or other person that they could trust to take custody and care of their animal(s) upon their death, The Denver Dumb Friends League has what they call a “Pet Guardian Program” for dogs, cats, birds and some other animals. You need to check this out to see if this is an option.

7. **HONORARY TRUSTS; TRUSTS FOR PETS**

An Honorary Trust is one that does not have a beneficiary who can enforce its provisions, often used for a specific, lawful, non-charitable purpose, but is still considered valid. A Trust for Pets or “Animal Trust” is a trust created for the care of a particular animal (or animals) and the animals’ offspring in gestation. It is similar to an Honorary Trust in that there also is no beneficiary who can enforce its provisions. Colorado has a good “Animal Trust” Statute: CRS § 15-11-901 that provides the following regarding such trusts:

- a. Such trusts can be set up for the care of a designated animal or animals, and its/their offspring, and can continue for the entire lifetime(s) of the designated animal(s), but only for the lifetime(s) of its offspring which are “in gestation”.
- b. The trust instrument shall be liberally construed to carry out the general intent of the Transferor, and extrinsic evidence shall be allowed in determining such intent.
- c. Such trusts are a statutory exception to the Rule against Perpetuities.
- d. The statute specifies how the remainder of the trust assets will pass after the death of the specified animal(s), if not otherwise provided for in the trust instrument.
- e. The trust may be enforced by the following persons:
  - (1) A person designated under the trust instrument;

(2)The person having custody of the animal/beneficiary.

(3)A remainder beneficiary;

(4)Or if none, a person appointed by a Court upon application to it by an individual.

- f. Such trusts shall be subject to the same rights and restrictions regarding administration that all other trusts are subject to.

Due to the fact that other states may not have enacted “Animal Trusts”, this trust may fail or that the provisions for the care of animal/pets might be challenged by a disgruntled remainder beneficiary or heir of a Decedent, it is wise to provide in all such trusts language which will protect the intent of the Transferor should the provisions of the trust for the benefit of the animal/pets be found invalid. The following is a sample of such language:

Contingent Provisions: It is my intention that, regardless of the situs of administration, this trust shall be valid under the present Colorado Probate Code, which provided that Trusts held for the benefit of animal(s) or Pet(s) are an exception to the Rule Against Perpetuities. In the alternative, it is my intention that the animal(s) covered by this Trust shall be considered “measuring lives” under any Rule Against Perpetuities, if such becomes necessary to validate this Trust. If this Trust shall fail for any reason, I direct that the funds be paid.....

One Option “. . . outright to the caretaker(s) of such animal(s), in equal shares, and that any remainder interest shall lapse.”

## DETAILED INSTRUCTIONS AND INFORMATION

No matter what provisions are made for the care of animals, it is important to also leave detailed instructions as to the animal's behavior, needs, care and health.

The following are some of the issues you may need to address:

1. **Sale of Animals:** Provisions can be made in the estate planning documents for a particular person, who knows the animal(s) and/or has expertise with the breed, to handle the sale of the animal(s). It may also be appropriate to provide that such person be given a commission on the sale (a dollar amount or percentage of sale for the commission), so as to assure that he/she will be willing to spend his/her time and effort in finding appropriate homes for the animal(s).
2. **Insuring valuable Animals:** If the owner of the animal(s) maintained life or health insurance on the animal(s), the fiduciary should continue such coverage during any period in which they have responsibility for the animal(s). This would certainly be a qualified expenditure of a Trust or for an Agent under a Power of Attorney.
3. **If an Animal Trust is used,** you will want to include:
  - The name and address of a trustee and alternate trustee.
  - The name and address of a caregiver and alternate caregiver.
  - Detailed information identifying your pet.
  - The standard of living and care you wish for your pet.
  - A detailed description of the property that will fund the trust.
4. **If an Animal Trust is not used,** then it may be necessary to provide in a Will or Revocable Trust for the care of the animal(s) until they can be placed with new and permanent caregiver/owner. This would be considered an expense of administration to be paid by the Estate/Trust,
5. **Bill of Sale or Transfer:** It is a good idea for the fiduciary, whether it is an Agent under the Power of Attorney or Personal Representative, or a Trustee, to provide a Bill of Sale or Transfer to the new owner or caregiver of the animal(s) so that he/she can prove that he/she is entitled to have custody of and provide care for the animal.
6. **Registered Animals:** If the animal(s) is registered as a purebred with AKC, it will be necessary to make sure all have been registered and that the proper documents are executed to transfer the registration to the new owner.
7. **Handling a business that includes Animals:** When a person(s) own a business that includes animals, such as a boarding facility, kennel, grooming business, etc. it is important for the Estate Planning Attorney to make provisions for that business if the owner becomes incapacitated or dies. In the case of death, this would include the transfer of that business to new owners by bequest or the sale of that business. In such situations it may be necessary to provide for the continued operation of the business until the transfer or sale can be completed.

EXAMPLE  
**MEMORANDUM  
FOR  
ANIMALS**

In accordance with Article \_\_\_\_\_ of my Last Will and Testament, I leave the following dogs/animals/pets to the following persons with accompanying papers and instructions.

<u>DESCRIPTION OF ANIMAL</u>	<u>NAME AND ADDRESS OF PERSON OF DESIGNATED OWNER/CAREGIVER</u>
1. _____	_____ _____ _____
2. _____	_____ _____ _____
3. _____	_____ _____ _____
4. _____	_____ _____ _____
5. _____	_____ _____ _____
Dated: _____	Testator Signature: _____

EXAMPLE  
**MEMORANDUM  
OF**

**PERSONAL PROPERTY**

In accordance with Article \_\_\_\_ of my Last Will and Testament, I leave the following personal property to the following persons:

<u>DESCRIPTION OF PERSONAL PROPERTY</u>	<u>NAME AND ADDRESS OF PERSON TO RECEIVE THE ITEM OF PROPERTY</u>
1. _____	_____ _____ _____
2. _____	_____ _____ _____
3. _____	_____ _____ _____
4. _____	_____ _____ _____
5. _____	_____ _____ _____
6. _____	_____ _____ _____
7. _____	_____ _____ _____

Dated: \_\_\_\_\_

Testator Signature: \_\_\_\_\_

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